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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRADLEY BERGMAN,

Defendant and Appellant.

B214336

(Los Angeles County
Super. Ct. No. TA090164)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Eleanor J. Hunter, Judge. Affirmed.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne
and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Bradley Bergman appeals from a judgment entered after a jury convicted him of count 1, assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹ and count 2, corporal injury to spouse (§ 273.5, subd. (a)).² The jury found true that appellant inflicted great bodily injury as to each count. (§ 12022.7, subd. (e).) The jury also found true a prior strike (§§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)), two prior prison terms (§ 667.5, subd. (b)), a prior serious felony (§ 667, subd. (a)(1)), and a prior domestic violence conviction (§ 273.5, subd. (a)).

The trial court sentenced appellant to 20 years in state prison consisting of ten years on count 2 (the upper term of five years, doubled), plus four years for the great bodily injury enhancement, plus five years for the prior serious felony, plus one year for a prior prison term. The trial court stayed the sentence on the assault with a deadly weapon count pursuant to section 654.

We affirm.

CONTENTIONS

Appellant contends that: (1) the trial court abused its discretion when it denied his motion to strike a prior felony conviction; and (2) the trial court abused its discretion when it sentenced him to the high term on count 2.

FACTS AND PROCEDURAL BACKGROUND

The current incident

Appellant and Maria Bergman (Maria) married on July 20, 2003. Their marriage was punctuated by physical abuse and accusations of infidelity by appellant against Maria. On April 7, 2007, appellant and Maria were moving items into their storage unit in Carson. Appellant argued with Maria because he did not want her to leave the car to use the restroom. Maria was still in pain from recent back surgery. Appellant got upset

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The jury found appellant not guilty of count 3, attempted premeditated murder (§§ 187, subd. (a), 664).

when Maria left the car and began chasing her with a knife. Maria screamed “stop it!” and yelled for help. Appellant grabbed her and stabbed her in the back of the head. Maria fell to the ground. The incident was witnessed by Diane Lindemann (Lindemann) and her fifth grade son. A maintenance man called 911 while appellant knelt by Maria and whispered in her ear. Appellant told Lindemann and the maintenance man that Maria had suffered a seizure and did not want to talk to anyone. The 911 operator gave instructions to apply pressure to Maria’s head wound. Lindemann returned to her car to get a rag, and appellant returned to his car to get paper towels. A subsequent laboratory test found no detectable trace of blood on a knife which was later recovered from appellant’s car.

Prior domestic violence incidents

On August 15, 2003, appellant broke down the door of a motel room and hit Maria in the face because she brought back the wrong kind of food from a McDonald’s restaurant.

On October 12, 2003, appellant accused Maria of cheating and beat her while they were in the parking lot of a Carl’s Jr. Maria called an ambulance and the police later arrived.

On November 11, 2003, appellant accused Maria of cheating while they were in their camper. Appellant started strangling her, flung her around, and threw her out in the parking lot.

On December 20, 2003, appellant woke up Maria who was asleep in their camper. Appellant grabbed her by her hair and threw her off the bed. Maria hit her face on the dinette table. Appellant also bit Maria in the neck. Maria sustained scratches and bruises.

On March 22, 2004, appellant hit Maria in the head and ankle with a broomstick. He broke the broomstick over her head. Maria reported appellant to police officers at a hospital.

On April 26, 2004, while in their camper, appellant accused Maria of cheating, slapped her across the face, and beat her. He then lit towels on fire and threw them at her while she was on the bed. Maria escaped through the roof latch of the camper and called for an ambulance.

An expert witness testified that Maria suffered from battered woman's syndrome. Lynda Johnson (Johnson), paralegal for the County of Los Angeles District Attorneys' office testified that she received a packet from the Department of Corrections regarding appellant's criminal history. She testified that the packet showed that on December 3, 2004, appellant was convicted of violating section 273.5, subdivision (a) and section 422 (making threats of bodily injury).

DISCUSSION

I. The trial court did not abuse its discretion when it denied appellant's motion to strike a prior conviction

Appellant contends that the trial court abused its discretion in denying his motion to strike his strike prior felony conviction. We disagree.

Section 1385 authorizes the trial court to strike prior convictions in "furtherance of justice." The term "'furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530.) The courts must recognize society's legitimate interest in the fair prosecution of crimes properly alleged by refraining from arbitrarily cutting those rights without a showing of detriment. (*Id.* at p. 531.) A trial court abuses its discretion if it strikes a prior conviction allegation simply because a defendant pleads guilty; or because it may have a personal antipathy for the harsh sentencing result that the "Three Strikes" Law would have on the defendant while ignoring the defendant's background, the nature of his present offense, and other individualized considerations. (*Ibid.*)

However, it is not our role to substitute our judgment for that of the trial court, but to determine whether the trial court acted in an arbitrary, capricious, or patently absurd manner that results in the manifest miscarriage of justice. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433–1434.) In the absence of such a showing we must presume that the trial court acted to achieve legitimate sentencing objectives and we may not set aside the trial court’s discretionary determination to impose a particular sentence. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978 disapproved on other grounds in *People v. Williams* (2005) 35 Cal.4th 817, 832.)

Appellant’s suggestion that the trial court was biased toward him and did not seriously consider striking a prior conviction is not supported by the record. The record shows that the trial court was aware of its discretion to dismiss a strike, stating that “I do believe that it’s the Court’s option whether to [strike or not] based on a number of things. And I don’t feel the Court at this point is inclined to exercise that option. Based on the defendant’s history, based on the defendant’s conduct and in this case, it wouldn’t warrant the Court to exercise the option to strike the priors.” The record shows that the trial court considered the parties’ moving papers, appellant’s trial counsel’s argument, as well as appellant’s criminal history and his conduct in the current case in declining to strike a prior conviction. Yet, appellant argues that the trial court’s decision to decline to strike a prior was an abuse of discretion because it did not consider that his recent criminal history resulted from his stormy relationship with Maria, which was ending because of a pending divorce, and that without the strike prior his sentence was still significant in light of his advanced age of 55. However, the record revealed that appellant had a long criminal history beginning in 1975, with an increase in violence, leading to the succession of violent attacks on Maria. We find no abuse of discretion in the trial court’s determination that appellant was clearly within the spirit of the Three Strikes law.

The trial court did not abuse its discretion in denying appellant’s motion to strike a prior conviction.

II. The trial court did not abuse its discretion in sentencing appellant to the upper term on count 2

Appellant contends that the trial court abused its discretion by imposing the upper term on count 2. We disagree.

The trial court's decision to impose an upper term sentence is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.'" (*Ibid.*) "[A] trial court will abuse its discretion under the amended scheme if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Id.* at p. 847.) The trial court may rely on criteria reasonably related to the decision being made. (Cal. Rules of Court, rule 4.408, subd. (a); Cal. Rules of Court, rule 4.421, subd. (a).)

The trial court properly relied on three aggravating factors in imposing the upper term: that Maria was particularly vulnerable because appellant knew that Maria had just had back surgery (Cal. Rules of Court, rule 4.421(a)(3)); that he had victimized Maria in the past (Cal. Rules of Court, rule 4.421 (b)); and that the crime was committed with callousness (Cal. Rules of Court, rule 4.421 (a)(1)). The three aggravating factors were amply supported by the evidence in the record. Appellant had abused Maria in at least seven prior incidents of domestic violence and she suffered from battered woman's syndrome. In this instance, appellant chased Maria, who had just had back surgery and wanted to use the restroom, ultimately stabbing her in the head.

We find no abuse of discretion in the trial court's imposition of the upper term on count 2.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ